

20 years since Mabo: The Facts on Native Title

Key developments

- 1** The Mabo decision was a watershed moment in Australia's history. In a long awaited decision, the High Court rejected the doctrine of terra nullius and recognised the prior occupation and continuing connection of Aboriginal and Torres Strait Islander peoples to their land.
- 2** The Native Title Act was enacted in 1993. It attempted to clarify the legal position of landholders and the process for claiming, protecting and recognising native title in the courts. The Act was amended in 1998 by the Howard Government to provide security of tenure to non-Indigenous holders of pastoral leases and place further restrictions on native title.
- 3** Since then, the courts have lifted the bar to making a successful claim higher. In 2002, in the Yorta Yorta decision, the court ruled that the 'tide of history' had 'washed away' any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants.¹ The decision adopted strict requirements of continuity of traditional laws and customs in order for native title claims to succeed.
- 4** Today, native title parties continue to make applications, reach agreements, and seek remedies to past injustice. The native title system "lumbers on", but is it fair or equitable?²



The big picture

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- Nearly 2000 native title applications were filed between 1994 and 2011.
- To date, 195 native title determinations have been made. Of these determinations:
 - » 69 found that native title exists in the entire determination area
 - » 82 found that native title exists in parts of the determination area
 - » 44 found that native title does not exist.³
- Registered determinations of native title cover 1,158,876 sq km (15.1%) of the landmass of Australia.⁴
- As at 31 May 2012 there were a total of 473 active native title applications still in the system.⁵

¹ Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; (2002) 194 ALR 538.

² Social Justice Commissioner, Native Title Report 2011.

³ AIATSIS (2012) 'Determinations' What's New in Native Title June 2012, p. 1-2, available: www.aiatsis.gov.au/ntru/documents/Determinationssummary.pdf. Of these 44 determinations, 35 were made in response to non-claimant applications and 30 were unopposed. See National Native Title Tribunal (NNTT) 20 years of native title, p. 4, available: www.nntt.gov.au/News-and-Communications/Publications/Documents/Booklets/20%20years%20of%20native%20title.pdf

⁴ As at 31 December 2011. NNTT (2012) National Report: Native Title, February, p. 2, available: www.nntt.gov.au/News-and-Communications/Publications/Documents/Corporate%20publications/NNTT-national-report-card-February-2012.pdf

⁵ NNTT (2012) 'Facts and Figures', www.nntt.gov.au/Information-about-native-title/Pages/Factsandfigures.aspx



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Much has been achieved, but is the system fair?

Twenty years since Mabo, the limitations of the native title system have become increasingly apparent.

The playing field is not level

The onus of proof on native title claimants places the responsibility on the party with fewer resources to prove continuous connection to country. This is an onerous burden. With native title bodies chronically under-resourced, the playing field is grossly uneven.

The process is slow and complex

Native title litigation takes an average of 7 years to resolve.⁶ The system is slow, complex and draining for many claimants. Many do not live to see the outcomes of the claims they initiated. As time passes, claimant groups are losing their Elders, the holders of much traditional knowledge.

Rights are vulnerable to extinguishment

While native title claimants face an enormous struggle to prove their continuing connection to country, it is often much easier for those opposing the claim to prove extinguishment of native title rights under law.

Rights are limited and preclude economic development

For those native title groups who are successful, their rights are limited. While native title rights can include possession, occupation, use and enjoyment of traditional country, they exclude the right to develop the land. This is keeping many Aboriginal and Torres Strait Islander communities in poverty.

⁶ Based on an analysis of the 200 applications the subject of registered determinations during this period, NNTT, *National Report: native title*, February 2012, available at www.nntt.gov.au/news-and-communications/publications/documents/corporate%20publications/nntt-national-report-card-february-2012.pdf.

It is time for reform to deliver a fair and equitable native title system.

Twenty years on, show your support today to realise the promise of Mabo.

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